IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1008 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

BHARATBHAI SHANKERBHAI PANCHAL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR NITIN M AMIN for Appellant
MR R.C.KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 05/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. This appeal is directed against the judgement and order dated 28th September, 1998 passed by learned Additional Sessions Judge, Court No.XVI, Ahmedabad in Sessions Case No.1 of 1998 whereby the appellant has been convicted for the offences punishable under sections 302 and 307 of the Indian Penal Code. For the offence under section 302 of the IPC, the appellant has been sentenced to imprisonment for life and a fine of Rs.1000/- and in default rigorous imprisonment for a period of one month and for the offence under section 307 of the IPC, he has been sentenced to undergo rigorous imprisonment for seven years and a fine of Rs.1000/- and in default to undergo further rigorous imprisonment for a period of one month.

2. The case of the prosecution as per the First Information Report and as unfolded during the trial is that on 3.8.1998 at about 17:30 hours, the complainant Smitaben (hereinafter referred to as “the deceased”) who had been admitted in the Burns Ward of Shardaben Hospital, had lodged a complaint before the Police Inspector, Bapunagar Police Station, stating that she was residing with her husband and daughter Keta, aged nine years at Bapunagar in Ahmedabad. She had been married to the accused approximately ten years prior to the date of the incident and during the said period she had been subjected to untold harassment at the hands of her

husband, but she had been tolerating the same. On 3.8.1997 at about 11:00 a.m., her husband came home in a drunken condition whereupon she asked him why he had consumed liquor and come. On her saying so, he gave her slap upon slap but she did not utter a word. At about 2 o'clock in the afternoon her husband told her to leave the house, whereupon she told him that she had called up her brother and he would come in the evening and she would go away then. Whereupon he was enraged. At that time she and her daughter were in the big room of their house, her husband came with a gallon tin filled with kerosene and sprinkled kerosene on her and her daughter Ketu and set them ablaze by lighting a match stick. Both she and her daughter were ablaze and started shouting whereupon their neighbours Sarojben and Alkeshbhai who lived in the house opposite to theirs, came running there and doused the fire by pouring water on them. Thereafter some neighbour fetched a rickshaw, whereupon she took her daughter and sat in the rickshaw and her husband also came and sat down beside her. The rickshaw-wala was asked to take them to Shardaben Hospital. However, her husband alighted from the rickshaw at Saraspur and she and her daughter went in the same rickshaw to Shardaben hospital where they were admitted in the Burns ward. The complainant and her daughter both were fully conscious. As per the say of the complainant her husband was not doing any work since about two and a half years

and was habituated to drinking liquor. He would consume liquor everyday, and on her telling him not to drink liquor he would beat her up and harass her. On 3.8.97 also he had beaten her for the same reason and thereafter poured kerosene on her and her daughter and set them ablaze, as a result of which they had both sustained severe burn injuries. After recording the complaint, the same was forwarded to the P.S.O. Bapunagar Police Station where it was registered at Bapunagar Police Station I C.R. No.200 of 1997 for the offences punishable under section 307 and 498A of the Indian Penal Code.

3. Thereafter the Investigating Officer had recorded the statement of Keta and taken steps to seize the clothes worn by both the burn patients. Subsequently, an officer from the Forensic Science Laboratory had arrived at the scene of offence, whereupon in his presence scene of offence panchnama was drawn in the presence of panchas. Muddamal articles No.1 to 8 were recovered under instructions of the said officer and sealed in the presence of panchas. On 4.8.97 at 10:45 hours, the accused was arrested and panchnama of his physical condition was drawn and the clothes worn by him were seized in the presence of panchas. As the accused appeared to be intoxicated, separate proceedings were initiated in that regard. Subsequently on 7.8.97, the deceased succumbed to the injuries; hence the Investigating

Officer had submitted a report to the Learned Chief Judicial Magistrate, for addition of Section 302 of the Indian Penal Code.

4. Upon conclusion of the investigation, the Investigating Officer submitted charge sheet in Criminal Case No.833 of 1997 in the Court of the learned Chief Metropolitan Magistrate, Ahmedabad for the offences punishable under Sections 302, 307 and 498A of the Indian Penal Code.

5. As the offence under section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned Chief Metropolitan Magistrate, by an order dated 22.12.1997 committed the case to the Court of Sessions, Ahmedabad where it was numbered as Sessions Case No.1 of 1998.

6. The learned Sessions Judge, to whom the case was made over for trial, framed Charge at Exh.2 for the offences punishable under sections 302 and 307 of the Indian Penal Code. The charge was read over and explained to the accused, who pleaded not guilty to the charge and claimed to be tried.

7. In order to establish the charge against the accused, the prosecution examined the following eleven witnesses:

PW-1 Keta Bharatkumar Panchal, Exh.11

Daughter of the deceased and an injured eye witness.

PW-2 Ranjitsinh Virsinhbhai Gohel, Exh.19 Executive Magistrate who recorded the dying declaration of the deceased.

PW-3 Dr. Ashwinbhai Shanabhai Lakhani, Exh.24 Medical Officer who had treated the deceased and Keta at the Shardaben Hospital.

PW-4 Kamlaben Jayantibhai Panchal, Exh.31 tenant of the accused – declared hostile by the prosecution.

PW-5 Bharat Bhagwandas Kansara, Exh.32 tenant of accused – declared hostile by the prosecution.

PW-6 Dr. Hasumatiben Ranchhodbhai Patel, Exh.33 Medical Officer who had conducted autopsy on the dead body of the deceased.

PW-7 Maheshkumar Ambalal, Exh.36 – Panch of Scene of Offence Panchnama.

PW-8 Rajesh Jagdishchandra Panchal, Exh.38 Brother of the deceased.

PW-9 Ratansinh Amarsinh Chauhan, Exh.40 – Police Constable who had recorded the vardhy under instructions of the R.M.O.

PW-10 Ramjibhai Nathubhai, Exh.42 – Head Constable, Bapunagar Police Station. He had noted down the vardhy given by Constable Ratansinh.

PW-11 Kuberbhai Karsandas Patel, Exh.46 – Investigating Officer.

8. The prosecution has also produced and proved the following documentary evidence and has placed reliance on the contents thereof:

1. Panchnama of recovery of clothes of the deceased and PW-1 - Exh.9
2. Panchnama of the physical condition of the accused - Exh.10
3. Inquest Panchnama – Exh.11
4. Medical Certificate of the accused – Exh.12
5. Medical Certificate of injured Keta – Exh.13
6. Despatch Note – Exh.14
7. Report of Forensic Science Laboratory – Exh.15
8. Forensic Science Laboratory opinion – Exh.16
9. Cause of death certificate – Exh.17
10. Yadi sent to Executive Magistrate – Exh.20
11. **Dying Declaration of Smitaben** – Exh.21
12. Statement of Ketuben – Exh.22
13. Another Yadi – Exh.23
14. **Medical Case Papers of Ketaben** – Exh.25
15. **Medical Certificate of Smitaben** – Exh.28

16. **Medical Case Papers of Smitaben** – Exh.29
17. Panchnama of Scene of Offence – Exh.37
18. **Post Mortem Report** – Exh.39
19. Entry made on page 65 of Vardhy Book – Exh.43
20. **Copy of vardhy** – Exh.44
21. Copy of entry made in Station Diary – Exh.45
22. **First Information Report** – Exh.47
23. Copy of report for registration of Offence – Exh.48

9. At the end of trial, the incriminating circumstances appearing in evidence against the accused were put to him and his statement was recorded under section 313 of the Code of Criminal Procedure, 1973 (in short “the Code”). The accused denied the case of the prosecution but did not lead any evidence or examine any witness. However, the accused submitted a written reply in his defence stating that on account of downfall of his business he had become frustrated and become addicted to liquor, which had destroyed his health and family life. That his wife had tried to reform him but as he could not get rid of his addiction, she had broken down. On the day of the incident he had consumed a lot of liquor and his wife was nagging out of frustration and he was lying intoxicated on the verandah. Upon his wife and daughter catching fire and running to Sarojben’s house he had stood up with great

difficulty and gone after them to Sarojben's house and together with them he had doused the fire on his wife and daughter and then taken them to Shardaben Hospital for treatment. However, he had alighted near the gate of the hospital as at that time he was in a highly intoxicated condition and was afraid that the police at the hospital casualty would apprehend him. He has alleged that his wife and his daughter had not given any dying declaration against him voluntarily, and that he had not set them on fire, but in the afternoon his brothers-in-law and their wives had come to the hospital and turned them against him and would not let his family members meet them.

10. The learned Additional Sessions Judge after hearing the learned Advocates for the parties and appreciating and analyzing the evidence adduced by the prosecution, held that the deceased had died a homicidal death and that the accused was the author of the crime and passed the impugned judgement and order convicting and sentencing the accused as referred to hereinabove in paragraph (1) of this judgement. The order of conviction and sentence rendered by the learned trial Judge has been called in question by the appellant by way of the present appeal under Section 374 of the Code.

11. Assailing the impugned judgement and order, Mr. Nitin Amin learned Advocate for the appellant

has submitted that the prosecution has failed to establish its case beyond reasonable doubt and considering the evidence produced on record by the prosecution, the appellant ought not to have been convicted for the offences punishable under section 302 and 307 of the Indian Penal Code. The main thrust of the arguments advanced by the learned Advocate for the appellant was that

- There is no medical evidence or opinion on record to negate the theory that this is a case of suicide.

- The only evidence in support of the prosecution case is in the nature of First Information Report, Dying Declaration and depostion of PW-1 Keta.

- The evidence of Keta is contrary to her dying declaration in that she has introduced a totally new story that the accused had demanded Rs.500/- from the deceased asking her to bring the said sum from her father, therefore, her testimony is totally untrustworthy and no reliance can be placed upon the same.

- On the basis of the testimony of PW-8 the brother of the deceased, it was contended that there was positive evidence that the brothers of the deceased and their wives who

were present in the company and service of the deceased within a short while of their being admitted to the hospital, had ample opportunity of tutoring the deceased and PW-1. That the oral dying declaration before PW-8 is concocted and contrary to the first version put forward by the prosecution and being a weak piece of evidence, cannot be relied upon.

- That there was positive evidence that the accused was a drunkard and the deceased was fed up of his drinking habits, hence, this could have been the reason for the deceased to have committed suicide.

- That her relatives were present with the deceased prior to the recording of her dying declaration, hence the possibility of tutoring cannot be ruled out.

- On the basis of the deposition of PW-3 Dr. Lakhani, it was submitted that the deceased and Keta were initially examined by the Casualty Medical Officer before being taken to the Burns Ward. That neither of them had given any history that the accused had poured kerosene on them and set them on fire as no such history has been recorded in the papers of the Casualty Medical Ward, which was prepared before the arrival of the family members of the deceased. Thus, the only possibility is that the so-called dying

declarations given by the deceased and Keta are tutored and no reliance can be placed upon the same.

12. In conclusion it was submitted that upon an overall view of the evidence produced by the prosecution, the prosecution had miserably failed to bring home the charge against the accused. It was therefore, urged that the appeal by allowed by setting aside the conviction and sentence against the appellant and that the appellant be acquitted of the charges leveled against him.

13. As against that, Mr. R.C. Kodekar, learned Additional Public Prosecutor has submitted that there was ample evidence on record to connect the appellant with the commission of the crime in question. Referring to the evidence adduced by the prosecution it was submitted that the prosecution had successfully established the charge against the appellant through the evidence of the injured eyewitness PW-1 Keta read with the Medical history stated by the deceased before the Doctor who had treated her, the First Information Report lodged by the deceased as well as the dying declaration of the deceased recorded by the Executive Magistrate, all of which are duly proved through the testimonies of PW-3 the Medical Officer, PW-11 the Investigating Officer and PW-2 the Executive Magistrate. It was further submitted that the evidence of the said

witnesses was further supported by the panchnama of the scene of offence, the report of the Forensic Science Laboratory, the Post Mortem Report etc. The learned Additional Public Prosecutor has emphasized that the view taken by the learned Judge of the trial Court is in accordance with law and the same should not be interfered with by this Court. It was, accordingly, urged that the appeal being devoid of merit, be dismissed and the impugned judgement and order be confirmed.

14. We have heard the learned Counsel for the parties and taken into consideration the evidence on record. In order to assure ourselves that the conviction based on the testimony of the child witness and dying declaration is proper, we have considered minutely and in detail, the evidence relating to the child witness and the dying declarations.

15. To prove the complicity of the accused in the commission of the offence in question, the prosecution has mainly relied upon the evidence of PW-1 Keta Bharatbhai Panchal, who is the daughter of the deceased and is an injured eye witness and the three written dying declarations: firstly before PW-3 Dr. Ashwin Shanabhai Lakhani in the form of medical case history, secondly before PW-11 the Investigating Officer in the form of the First Information Report and thirdly before PW-2 the

Executive Magistrate in the form of a dying declaration; as well as the oral dying declaration before PW-8 brother of the deceased.

16. The testimony of PW-I who is an injured eyewitness is a significant piece of evidence. This witness is a child witness. Before recording her evidence the learned trial Judge has ascertained that she has the requisite maturity and intelligence to testify before the Court. She has deposed that she used to live with her parents at Bapunagar and presently was residing with her aunt and uncle (mother’s sister and her husband) and was studying in the fifth standard. She has deposed that her mother had expired on 7.8.97. She has further deposed that on the day of the incident there was a big quarrel between her parents. Her father had asked her mother to bring Rs.500/- from her father’s house, whereupon her mother had told him that she had given him a phone call and he would come at 4 o’clock. At two o’clock her father asked her mother that it was two o’clock why has the money not come yet. Whereupon her mother had told her father that her brother would come with the money at 4 o’clock. Therefore, at about 1:30 to 2:00 o’clock her father poured kerosene on her mother in her presence and also poured kerosene on her. He, then, lighted a bidi and threw the matchstick on her and her mother due to which both of them were on fire. At that time a plastic bucket

filled with water was lying there, so she had herself doused the flames by taking the water from the bucket. She has further deposed that Sarojben Bhavsar who used to reside in the opposite house had come and as her mother was ablaze she had poured water over her and extinguished the fire. Thereafter people from her society had called a rickshaw and she and her mother had on their own gone to Shardaben Hospital in the rickshaw where they had been admitted in the burns ward. She has also deposed that she had sustained burns on her neck, both her hands, both her thighs and hips. Four days after the incident, that is, on the morning of the fifth day, her mother had expired. This witness has been extensively cross-examined. But despite being a child witness she has successfully withstood the searching cross-examination. The only contradiction in her testimony and the statement made before the Executive Magistrate is regarding the cause of the quarrel before the incident took place. However, her statement is consistent as regards the place, time of incident, presence of the accused and the manner in which he set them ablaze. The testimony of PW-1 has been attacked by the learned Advocate for the appellant on the ground that in the Vardhy registered by the police it has been noted that Keta had received burn injuries when she embraced her mother, alleging that the story of kerosene being poured on her has been developed later on. The

said contention is misconceived in that the vardhy has been noted down by the concerned constable under instructions of the R.M.O., whereas there is ample direct evidence of the injured eyewitness as well the dying declarations which are referred to hereunder. Besides it is well settled that some minor embellishments here or there do not affect the credibility of the witness if otherwise found to be trustworthy and reliable. We consider the discrepancy pointed out by the learned Counsel for the appellant as too feeble a ground to doubt the evidence of this eyewitness. The core of her testimony remains reliable and no good reason can be traced out to reject it.

17. The evidence of PW 1 gets support from the testimony of PW 3 Dr. Ashwinbhai Shanabhai Lakhani, resident doctor, who was discharging duties in the plastic surgery department of the hospital and had given treatment to both, the deceased as well as PW-1 in the Burns Ward of the hospital. According to this witness on 3.8.97 at 2:40 in the afternoon, he had examined one Ketaben Bharatbhai, who was fully conscious at that time and as she had sustained burn injuries he had asked her the history in that regard. She had told him that her father had poured kerosene on her and her mother and had set them ablaze and he had made an endorsement in this regard in the case papers. He has acknowledged his signature on the Medical Certificate Exh.13 and admitted the

contents thereof. This witness has been cross-examined at length but nothing contrary has been elicited to discredit his testimony. The history recorded by this witness as stated by PW 1 reads as follows:

"H/O given by patient.
Patient is fully conscious, well oriented.
H/O Homicidal burns.
Her father has poured kerosene over her and her mother and lighted at about 1:30 p.m."

The history narrated before the doctor is given almost immediately after being admitted to the hospital. Hence, there could not have been any opportunity for anyone to tutor her or in anyway influence her. Her statement before Executive Magistrate (Exh.22), which has been recorded as a dying declaration, further fortifies the evidence of this witness. However, as she has survived the said declaration cannot be considered to be a statement under section 32 of the Evidence Act but a statement under section 164 of the Code. On a conjoint reading of the testimony of PW-1 with the aforesaid medical case history and the statement before the Executive Magistrate there is no discrepancy in the main version of this witness that the accused had poured kerosene over her and the deceased and had set them afire. This witness being the daughter of the accused has no cause or reason to falsely implicate him. Hence, her testimony being

reliable and trustworthy is required to be accepted. Therefore, the complicity of the accused in the commission of the offence in question stands duly established through the evidence of this eyewitness.

18. However, over and above the evidence of the eyewitness the prosecution has placed reliance upon the three dying declarations referred to hereinabove in support of its case. Before appreciating the evidence of the witnesses and the contents of the dying declarations, it would be relevant to notice the law relating to dying declaration. In the case of ***Paniben v. State of Gujarat***, (1993 (2) GLR 985) the Supreme Court has formulated the principles laid down in several judgments of the Supreme Court governing dying declaration. A Division Bench of this Court in the case of ***State of Gujarat v. Maniben*** (2001 (2) GLR 1749) has very succinctly stated the law in this regard as under:

"Section 32(1) of the Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit-worthy. Under section 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that

category provided it has been made in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinize all the dying declarations to find out if each of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at that point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be

subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true: (1) Was the victim in a position to identify the assailant/s? (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities? and (3) Whether any material part is proved to be false by other reliable evidence?"

19. In the light of the principles laid down in the above-referred decisions, we may now proceed to consider the evidence on record relating to dying declaration and examine each of the dying declarations independently to ascertain the veracity of each declaration.

20. Apart from the evidence of the eyewitness, one of the most incriminating pieces of evidence against the accused is in the form of testimony of PW-3 Dr.Ashwin Shanabhai Lakhani who recorded the first dying declaration in the form of medical case history as stated before him by the deceased. According to this witness at the relevant time while he was discharging duties as a resident doctor in the plastic surgery department of the hospital, on 3.8.97 at 2:30 in the afternoon the deceased had been

brought before him in the Shardaben Hospital for examination. He has asserted that he had examined the patient who was fully conscious and was well aware of the surrounding circumstances. He has further stated that the deceased had suffered from burn injuries to the extent of 92%, and that he had issued certificate to that effect. He has further deposed that according to the case history noted by him the deceased's husband had poured kerosene over her and set her ablaze. He has also produced the medical case papers of the deceased collectively vide Exh.29. This witness has further deposed that deceased had expired on 7.8.97 at 9:00 o'clock in the morning. He has also admitted his signature on the Dying Declarations Exh.21 and 22 and stated that the endorsement below both the documents to the effect that the patients were fully conscious, is in his handwriting. This witness was cross-examined at length by the learned Counsel for the defence, but nothing could be elicited so as to doubt his version that the deceased was conscious and in a fit state of mind when she stated her history before him as well as when her statement was recorded by the Executive Magistrate. He has produced the original certificate vide Exh.28 and acknowledged his signature on the same.

21. The next dying declaration is in the nature of the complaint Exh.47 lodged by the deceased before the Investigating Officer at the

Shardaben Hospital. PW-11 Kuberbhai Karsandas Patel who at the relevant time was discharging duties as a Police Inspector at the Bapunagar Police Station and is the Investigating Officer in the present case has been examined at Exh.46. This witness has deposed that on 3.8.97 at 16:20 hours he was present at the Police Station when he received a vardhy from the P.S.O. *inter alia* to the effect that one Bharatbhai Shankarlal Panchal had poured kerosene on his Smitaben wife and their daughter Keta @ Ketu and set them on fire. He had, therefore, immediately gone to Shardaben Hospital and at 17:30 hours recorded the First Information Report as stated by the deceased, who had sustained burns and taken steps to register the same. This witness has been cross-examined by the learned Counsel for the defence, however, except suggesting that the dying declaration was prepared at the Police Station and inquiring as to why the opinion of the doctor has not been sought before recording the complaint, nothing has been put to this witness to suggest that the deceased was not conscious or that she was not in a fit state of mind to narrate the incident to the witness. This witness has produced and proved the vardhy Exh.44 as well as the First Information Report Exh.47. In ***Munnu & Anr. v. State of Madhya Pradesh***, AIR 1976 SC 2199, the Supreme Court has ruled that where after making statement before the police, the victim succumbs to his injuries, the statement can be treated as a

dying declaration and is admissible under section 32 (1) of the Evidence Act. Therefore, the First Information Report recorded by PW-12 as stated by the deceased will have to be treated as her dying declaration and is admissible in evidence under section 32(1) of the Evidence Act. The contents of the compliant also indicate that the deceased was in a fit state of mind and after understanding everything lodged the compliant with PW 12. It is difficult to believe that PW 12 would imagine the facts stated in the complaint produced at Exh.47 and create false document. It was never suggested on behalf of the defence to this witness that he had any enmity towards the accused. This witness had neither any grudge against the appellant nor any enmity, and therefore, would not concoct false evidence against the appellant. In the circumstances, there is no reason not to believe the testimony of this witness.

22. PW-2 Ranjitsinh Virsinh Gohel, Executive Magistrate who has recorded the third dying declaration (Exh.21) has been examined at Exh.19. This witness has deposed that on 3.8.97 at 18:30 hours, Police Constable Ratansinh had submitted a yadi from the Bapunagar Police Station for recording dying declaration, at his residence. He had made an endorsement in receipt of the said yadi and proceeded to the Shardaben Hospital for recording the dying declaration of the patient. He had gone to the

Burns Ward and met the In-charge and after inquiring about the patient, he had gone near the patient. He had asked ordinary questions to the patient and the patient was conscious and was replying properly. After ascertaining the aforesaid, he informed the patient that he was an Executive Magistrate and had come to record her statement and asked her to reply the questions that he would put to her. Thereafter he asked questions to the patient and recorded her reply in question answer form in his own handwriting. After recording her statement he had obtained the signature of the patient in his presence. After recording the statement he had obtained the opinion of the doctor that the patient was conscious. He has also noted that at the time of recording the statement no relative of the deceased or any policeman was present and had again put his signature and designation below the same. Thereafter, he had also obtained the signature of the doctor below the endorsement that the patient was conscious. This witness was also cross-examined on behalf of the appellant, but nothing could be brought on record to doubt his claim that he had recorded the statement of the deceased as narrated by her. This witness has also produced the dying declaration at Exh.21.

23. In the background of the testimonies of the aforesaid witnesses, we may now carefully scrutinize the three dying declarations.

24. The first dying declaration is in the nature of history recorded by the Medical Officer at the Shardaben Hospital in the medical case papers of the deceased wherein it has been noted as follows:

"H/O given by patient
Patient fully conscious, well oriented.
H/O Homicidal burns.
Her husband has poured kerosene over her and lighted."

25. In her complaint (Exh.47), which is the second dying declaration the deceased has stated that she was residing with her husband and daughter Keta, aged nine years at Bapunagar in Ahmedabad. She had been married to the accused approximately ten years prior to the date of the incident and during the said period she had been subjected to untold harassment at the hands of her husband, but she had been tolerating the same. On 3.8.1997 at about 11:00 a.m., her husband came home in a drunken condition whereupon she asked him why he had come after consuming liquor. On her saying so, he gave her slap upon slap but she did not utter a word. At about 2 o'clock in the afternoon her husband told her to leave the house, whereupon she told him that she had called up her brother and he would come in the evening and she would go away then, which enraged him. At that time she and her daughter were in the big room of their house, her husband came with a gallon tin filled with

kerosene and sprinkled kerosene on her and her daughter Ketu and set them ablaze by lighting a match stick. Both she and her daughter were ablaze and started shouting whereupon their neighbours Sarojben and Alkeshbhai who lived in the house opposite to theirs, came running there and doused the fire by pouring water on them. Thereafter some neighbour fetched a rickshaw, whereupon she took her daughter and sat in the rickshaw. At that time her husband also came and sat down beside her in the rickshaw. The rickshaw-wala was asked to take them to Shardaben Hospital. However, her husband had alighted from the rickshaw at Saraspur and she and her daughter went in the same rickshaw to Shardaben hospital where they were admitted in the Burns ward. Her husband was not doing any work since about two and a half years and was habituated to drinking liquor. He would consume liquor everyday, and on her telling him not to drink liquor he would beat her up and harass her. On 3.8.97 also he had beaten her for the same reason and thereafter poured kerosene on her and her daughter and set them ablaze, as a result of which they had both sustained severe burn injuries.

26. In the third dying declaration (Exh.21), which is in question answer, form the deceased has stated that her husband was a drunkard and after consuming liquor he would beat her up with whatever object he could lay his hands on.

On that fateful day i.e., 3.8.1997 her husband had come home in a drunken condition, whereupon she had told him that he was drinking too much liquor. On her saying so her husband beat her up and then brought out a tin of kerosene and poured it over her and set her ablaze by lighting a matchstick. After setting her ablaze, he poured kerosene over their daughter and set her ablaze. The complainant thereafter ran outside the house and went to her neighbour’s house, where her neighbours poured water over her and doused the fire.

27. On a close scrutiny of the aforesaid three dying declarations it is evident that there is no material discrepancy in the three dying declarations. All the three dying declarations have been duly proved by the prosecution through the evidence of independent witnesses who have no axe to grind against the accused. The statements of the deceased recorded by the Medical Officer, the Executive Magistrate as well as the Investigating Officer soon after the incident, are quite natural and voluntary. The evidence of the aforesaid three witnesses relating to dying declaration made by the deceased is straight-forward, firm and trustworthy. The dying declarations made by the deceased are consistent with each other. No material part of any of the dying declarations is proved to be false by any reliable evidence on record. The deceased had every opportunity to identify the appellant as her assailant. The

version narrated by the deceased is intrinsically sound and accords with all probabilities.

28. In sum and substance, it may be stated that right from the time the deceased came to be admitted to Shardaben hospital, that is, from 13:50 hours on 3.8.97, after which she came in contact with Dr. Lakhani at about 14:30 hours, thereafter with the Investigating Officer at 17:30 hours and when the regular dying declaration was made before the Executive Magistrate at 19:00 hours, she has consistently and in unmistakable terms maintained that it was her husband who had poured kerosene over her and her daughter and set them ablaze. We are fully satisfied that the dying declarations given by Smitaben are voluntary, truthful and genuine, leaving no trace of doubt. Having regard to the totality of the facts and circumstances of the case, we are of the opinion that the learned Judge did not commit any error in placing reliance on the evidence of the eyewitness as well as the dying declarations of the deceased for the purpose of coming to the conclusion that the appellant had set the deceased and PW 1 on fire by pouring kerosene on them, lighting a matchstick and setting them ablaze.

29. As to whether the death of the deceased was a homicidal death, it would be relevant to refer to the testimony of PW–6 Dr.Hasumatiben

Ranchhodlal Patel, Medical Officer (Exh.33) who has conducted autopsy on the body of the deceased. The cause of death as stated by this witness was septicaemia, which was due to ante-mortem burns. This witness has stated that there were 1st to 3rd degree infected burns all over the body and that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. She has further deposed that if kerosene is poured over a person and he is set on fire, such injuries can be caused. The evidence of this witness read with the evidence of the eye-witness as well as the three dying declarations, leaves no room for doubt that the deceased died a homicidal death.

30. It has been argued by the learned Advocate for the appellant that the death of the deceased was consequent to septicaemia, and as the death had taken place a few days after the incident the appellant had wrongly been convicted for the offence punishable under section 302 of the Indian Penal Code. In support of his contention the learned Advocate has placed reliance on an unreported decision dated 6.3.1999 rendered by a Division Bench of this Court in Criminal Appeal No.88 of 1990, in the case of ***Udesing Nathubhai Rana v. State of Gujarat***. In this regard PW-6 Dr. Hasumatiben has stated in her evidence that the burn injuries were sufficient in the ordinary course of nature to cause death. Besides, on examination of the relevant

evidence on record, we are satisfied that the burn injuries sustained by the victim resulted in her death and septicaemia which developed later on was also due to infection of burns sustained by her. septicaemia in simple medical terminology is understood to mean poisoning of blood. After it sets in, it affects first of all the kidneys, then brain and ultimately the heart causing death of the patient. Normally a patient dies within 48 hours of setting in of septicaemia. Thus, the burn injuries have caused the death of the victim and the appellant caused the same. We are of the opinion that even if a supervening factor causes death and the supervening factor is a necessary consequence or necessary incidence of the injury caused by the accused, then it can be said that the act of the accused itself has caused the death of the victim concerned. It is only if the supervening cause is totally unrelated to the original injury caused by the act of the accused, it can possibly be contended that the death is not a direct or proximate result of the act of the accused. On the basis of the evidence of Dr. Hasumatiben who conducted the autopsy on the dead body, which shows that septicaemia is a necessary consequence of the burns injury suffered by the deceased, we have no hesitation in holding that it was the act of the appellant, which resulted in the death of the deceased Smitaben. The decision of this Court in the case of ***Udesing Nathubhai Rana v. State of Gujarat*** (supra) on

which reliance has been placed on behalf of the appellant, does not lend any support to his case as in the facts of the said case the Court has specifically found that the prosecution had not come out with any imputation that the accused had committed any other overt act either of igniting matchstick or pushing the deceased on to the stove or to act in such a manner as would ultimately put an end to the life of the deceased. In the circumstances, we find that the learned Judge of the trial Court was justified in holding that the death of the deceased was a homicidal one and that the appellant was responsible for the same.

31. The learned Advocate for the appellant had also very vehemently contended that as the relatives of the deceased were present with her and PW-1 soon after the incident, the dying declarations and the statements given by them were tutored and cannot be relied upon. In an erudite decision rendered by a Division Bench of this Court in the case of ***State v. Rabari Pancha Punja & Others*** (1981 GLR 426), the law in this regard has been elucidated as follows:

"An argument was also advanced by the learned defence counsel that the dying declaration should not be accepted in view of the fact that the relatives of the deceased had come to the hospital and were near about the cot of the deceased. XXXXXX. but assuming that some relatives had arrived at the hospital and were near the cot of the injured person at the time when the dying declaration was recorded, that can by itself scarcely be considered as a good

or a valid ground for discarding the dying declaration. It is difficult to conceive of a case where relatives would not rush to the hospital and go near the injured person if they are in the same town and come to know of the injuries caused to their near and dear ones. In almost every case, relatives are bound to rush to his bedside. Unless the Court is prepared to virtually hold that a dying declaration is practically speaking not a relevant piece of evidence at all and no dying declaration can form the basis of a finding of guilt, the Court cannot countenance the argument that merely because the relatives are there, the dying declaration should be disbelieved. To do so would tantamount to saying that a dying declaration is practically speaking a worthless piece of evidence. No doubt the presence of relatives in the context of possibility of tutoring is a relevant consideration. It is one thing to say that it is a relevant consideration and if the Court has reason to believe that the dying declaration owes its origin to tutoring it may be disregarded. It is another thing to say that merely because the relatives are present and there is such a remote possibility it should be disbelieved."

In the light of principle laid down in the above-referred decision, we find no merit in the contention advanced by the learned Advocate for the appellant. Besides on appreciating the evidence on record, more particularly, the testimony of the Medical Officer who has opportunity to record the version stated by the deceased at the earliest point of time, we are of the opinion that the dying declaration given by the deceased is not as a result of tutoring as is sought to be contended on behalf of the appellant. We find the dying declarations to be true and voluntary and accordingly, we are of the view that in the facts of the present case

conviction can even be based solely on the dying declarations.

32. However, as discussed hereinabove, this is not a case where the prosecution rests only on the dying declaration. The positive evidence of the eyewitness on its own clearly establishes the guilt of the accused and the same is amply corroborated by the dying declarations.

33. Upon assessment and evaluation of the evidence relied upon by the prosecution, in our opinion, the trial Court was justified in placing reliance on the evidence of the eyewitness as well as the dying declarations, for the purpose of convicting the appellant- accused for the offences punishable under sections 302 and 307 of the Indian Penal Code. We find no infirmity to warrant interference in this appeal, which is devoid of any merit or substance. We, therefore, dismiss the appeal and confirm the impugned order of conviction and sentence.

[A.M.KAPADIA, J.]

[HARSHA DEVANI, J.]

parmar*